IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 29770

GARY CUNNINGHAM and MARTHA CUNNINGHAM,	)	**2004 Opinion No. 58**
Plaintiffs-Appellants,	)	**Filed: September 14, 2004**
v.	)	**Frederick C. Lyon, Clerk**
DONALD JENSEN and CHAROLETTE JENSEN, ARTHUR HANSEN, WILLIAM McCURDY, J. NICK CRAWFORD, and BRASSEY, WETHERELL, CRAWFORD AND McCURDY, LLP. ,	)	
Defendants-Respondents.	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Order granting motion to dismiss complaint, affirmed.

Dennis M. Charney, Eagle, for appellants.

Ringert Clark Chtd., Boise, for respondents Jensen and Hansen. Jennifer R. Mahoney argued.

Holland & Hart LLP, Boise, for respondents McCurdy and Crawford and Brassey Wetherell Crawford and McCurdy. B. Newal Squyres argued.

PERRY, Judge

Gary Cunningham and Martha Cunningham appeal from the district court's order granting a motion to dismiss their complaint. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

In 1998, the Cunninghams and Donald Jensen and Charolette Jensen entered into a contract for the purchase and sale of real property. Subsequently, the parties became involved in a dispute over the transaction in which the Cunninghams asserted that the Jensens made misrepresentations to entice them to purchase the property. In 2002, the Cunninghams filed a

complaint against the Jensens and the Jensens' grandson, Arthur Hansen. In their complaint, the Cunninghams alleged, among other things, that the Jensens and Hansen wrongfully concealed property defects; misrepresented property boundaries, size, and conditions; and falsely promised to improve or repair irrigation equipment. In that lawsuit, the Jensens and Hansen retained the law firm of Brassey, Wetherell, Crawford, and McCurdy, LLP, (hereinafter BWC&M) to represent them.

The Cunninghams asserted that during the course of the litigation, the Jensens, Hansen, and BWC&M engaged in wrongful and abusive actions for the purpose of delaying, stalling, and subverting the Cunninghams' case. The Cunninghams requested that the district court impose sanctions and enter a default judgment. The district court imposed sanctions against the Jensens, Hansen, and BWC&M but denied the request to enter a default judgment. The Jensens and Hansen filed a motion to reconsider the sanctions and the district court issued a decision affirming the sanctions and the denial of a default judgment. Ultimately, the lawsuit alleging misrepresentation and fraud was settled and the case was dismissed.

Prior to settlement, the Cunninghams filed a complaint against the Jensens, Hansen, William McCurdy, J. Nick Crawford, and the law firm of BWC&M (respondents), alleging abuse of process, conspiracy to abuse process, and intentional infliction of emotional distress. More specifically, the Cunninghams alleged that the respondents intentionally delayed the filing of an answer, intentionally delayed the taking of discovery depositions, intentionally refused to appear for scheduled depositions, refused to comply with requests for production of documents, presented false and perjured testimony, presented false and perjured affidavits, refused to comply with the district court's order compelling discovery, filed motions and pleadings which were not intended to advance the litigation, and made unsworn statements to the district court which were false and/or misleading. According to the complaint, the Cunninghams incurred injuries as a result of these alleged actions, including the loss of their anticipated trial date, the inability to use the real property for its intended purpose, the inability to cultivate crops, a delay in the construction of their home, the inability to divide and develop a section of the property, and the inability to develop and expand a horse boarding operation.

McCurdy, Crawford, and BWC&M filed a motion to dismiss pursuant to I.R.C.P. 12(b)(6) and attached an affidavit containing the district court's orders in the underlying litigation regarding sanctions. The Jensens and Hansen filed a motion to dismiss pursuant to

Rule 12(b)(6) and Rule 12(b)(8). The district court granted the Rule 12(b)(6) motions to dismiss, finding that the complaint failed to state a claim upon which relief could be granted. The Cunninghams appeal. On appeal, the Cunninghams argue that the district court erred by too narrowly interpreting the term "process" as used in the tort of abuse of process and by dismissing the conspiracy to commit abuse of process and intentional infliction of emotional distress claims.

II.
STANDARD OF REVIEW

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *Rim View Trout Co. v. Dep't. of Water Resources*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a Rule 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310; *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court dismissing a case pursuant to Rule 12(b)(6), the nonmoving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

III.
ANALYSIS

A. Abuse of Process

The Cunninghams argue that the district court erred in dismissing their complaint on the claim of abuse of process. Specifically, the Cunninghams assert that the district court erred in interpreting the term "process" too narrowly and using that interpretation to conclude that the respondents' conduct during the underlying litigation did not constitute the use of process.

Issues surrounding the tort of abuse of process have rarely been considered by the Idaho Supreme Court or this Court. The Idaho Supreme Court briefly discussed the tort in *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 126 (1988). In *Badell*, the Supreme Court relied on Arizona and Nevada cases and set forth the elements of the tort of abuse of process. Essential elements of

abuse of process are an ulterior, improper purpose and a willful act in the use of the process not proper in the regular conduct of the proceeding. *Badell*, 115 Idaho at 104, 765 P.2d at 129. In that case, Badell, a dentist, argued that the malpractice complaint against him was filed for the purpose of compelling a settlement and that there was no legal basis for filing the complaint. After reviewing the facts, the Supreme Court rejected Badell's argument and held that, because probable cause existed for filing the complaint, there was no evidence of misuse of process as settlement is one of the goals of proper process. Although the Supreme Court set forth the elements of the abuse of process tort in *Badell*, it did not define the term "process."

In its memorandum decision on the motion to dismiss in this case, the district court held that the respondents did not invoke the process of the court. Specifically, the district court found that a delay in filing an answer is not an abuse of process. The district court explained:

> There are definitive remedies under the rules of procedure that a plaintiff can utilize to compel a defendant to file an answer or obtain a default judgment. No authority has been presented to the court that a delay in the filing of a pleading such as an answer can be the basis for an abuse of process claim.
>
> Cases that have previously allowed a claim for an abuse of process in discovery proceedings have dealt with the discovery process being abused for purposes such as extortion or coercion. In this particular case, the Cunninghams had possession of the property in question however they were delayed in the development and income capacity of the property because of the defendant's actions in the discovery process.
>
> This Court must conclude that delays in the filing of pleadings and in the discovery process as set forth in the [Cunninghams'] complaint do not rise to the level of the use of "process." The interpretation of process requires that some act be done in the name of the Court and under its authority.

The Cunninghams assert that the district court interpreted the term "process" too narrowly and that this Court should follow the lead of other jurisdictions to interpret it to encompass the entire range of procedures incident to the litigation process, including discovery proceedings. In support of their position, the Cunninghams cite a number of cases that have adopted this broad interpretation. *See Hopper v. Drysdale*, 524 F. Supp. 1039 (D. Mont. 1981) (filing notice of deposition can be the basis for an abuse of process claim); *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz. Ct. App. 1982) (use of discovery proceedings can be the basis for an abuse of process claim); *Barquis v. Merchants Collection Ass'n of Oakland, Inc.*, 496 P.2d 817 (Cal. 1972) (filing actions in an improper county pursuant to statutorily inadequate pleadings sufficed as the use of process); *Twyford v. Twyford*, 134 Cal. Rptr. 145 (Cal. Ct. App. 1976) (requests for

admissions can form the basis for an abuse of process action); *Younger v. Solomon*, 113 Cal. Rptr. 113 (Cal. Ct. App. 1974) (interrogatories submitted to a party and enforced by sanctions constitute the use of "process"); *Thornton v. Rhoden*, 53 Cal. Rptr. 706 (Cal. Ct. App. 1966) (filing a notice of deposition can be the basis for an abuse of process claim); *Ely v. Whitlock*, 385 S.E.2d 893 (Va. 1989) (taking depositions can be the basis for an abuse of process claim).

The respondents acknowledge that the modern trend in case law is to expand the definition of process to include other procedures related to the litigation process. However, the respondents contend that under this expanded definition, even the broadest interpretation requires that some act be done in the name of the court and under its authority. *See City of Angoon v. Hodel*, 836 F.2d 1245, 1248 (9th Cir. 1988); *Long v. Long*, 611 A.2d 620, 623 (N. H. 1992); *Wells v. Waukesha County Marine Bank*, 401 N.W.2d 18, 25 (Wis. Ct. App. 1986); *Bosler v. Shuck*, 714 P.2d 1231, 1234 (Wyo. 1986).

Before we consider whether the respondents invoked the "process" of the court, however, we must address the first element of the tort as set forth in *Badell*--whether an ulterior, improper purpose existed. In their complaint, the Cunninghams alleged that the respondents "engaged in a wrongful and abusive course of action with the sole purpose of delaying, stalling and subverting the [Cunninghams'] case and/or to gain collateral advantages in the proceeding that are not authorized by law." When determining whether the Cunninghams failed to state a claim under Rule 12(b)(6), the district court had before it the pleadings, motions and briefing in support and in opposition to the motion to dismiss, and an affidavit containing the district court's orders in the underlying litigation regarding sanctions. The respondents contend that to review the district court's order granting the Rule 12(b)(6) motion on appeal, this Court must consider the district court's orders from the underlying litigation, which are properly included in the record. In support of this contention, the respondents cite to *General Refractories Co. v. Fireman's Fund Insurance Co.*, 337 F.3d 297 (3d Cir. 2003). In *General Refractories*, the Third Circuit addressed whether the district court erred in concluding that the plaintiff failed to state a claim for abuse of process and whether it abused its discretion in not permitting the plaintiff to amend its complaint. The Third Circuit noted that the allegations in the complaint largely replicated the trial court's findings below in the sanction proceedings. The Third Circuit reviewed these findings to conclude that the plaintiff could have cured any deficiencies in its complaint regarding the abuse of process claim if allowed to amend. We find this case instructive.

In the instant case, the district court in the underlying litigation issued an order regarding a motion to reconsider sanctions. In that order the district court summarized the problems that existed during the discovery proceedings. The district court, although not reversing its order granting sanctions, provided an explanation for such problems:

> It now appears that part of the problem, perhaps even most of it, throughout this case, was the fact that [the Jensens' and Hansen's] counsel, an attorney the Court has long known to be conscientious and very capable, was undergoing a mental collapse as a result of severe depression. While counsel appeared to be functioning, he was apparently incapable of completing tasks and was mired in a depression--caused paralysis. Finally, other members of the firm have stepped in to address the discovery issues and the [Cunninghams'] awards for sanctions and for default. Information about [the Jensens' and Hansen's] responses to the [Cunninghams'] discovery requests has now been provided in an orderly and thorough way.

The district court's order clarified why certain problems occurred in previous proceedings and that clarification did not include the respondents having an ulterior, improper purpose. Although it is undisputed that certain problems existed with respect to discovery proceedings, the Cunninghams have not demonstrated that the respondents committed these acts with an ulterior, improper purpose. Because the Cunninghams failed to satisfy the first element of the tort of abuse of process pursuant to *Badell*, we need not address whether the district court interpreted the term "process" too narrowly. We conclude that the district court did not err in dismissing the Cunninghams' complaint with respect to the abuse of process claim pursuant to Rule 12(b)(6).

B. Conspiracy to Abuse Process

The Cunninghams argue that, because it erred in dismissing the abuse of process claim, the district court also erred in dismissing the conspiracy to abuse process claim. In its memorandum decision dismissing the complaint, the district court ruled that, because the Cunninghams failed to set forth a claim upon which relief may be granted on the abuse of process claim, the claim of conspiracy to commit abuse of process must also fail. The district court explained:

> Civil conspiracy is not an independent tort but rather is a derivative tort that relies on an underlying actionable wrong. Having found that the Cunninghams have not set forth in their Complaint an underlying actionable wrong, this Court must conclude, therefore, that the conspiracy to commit the abuse of process claim must also be dismissed pursuant to [Rule] 12(b)(6).

The Cunninghams concede that the claim for conspiracy to commit abuse of process must fail if the claim for abuse of process was properly dismissed. Thus, because the Cunninghams have failed to demonstrate error in the district court's order dismissing their abuse of process claim, they also fail to demonstrate error in the district court's dismissal of their conspiracy to commit abuse of process claim.

C. Intentional Infliction of Emotional Distress

The Cunninghams assert that the district court erred in dismissing their intentional infliction of emotional distress claim. A claim for intentional infliction of emotional distress will lie only when there has been extreme and outrageous conduct by the defendant and resultant severe emotional distress suffered by the plaintiff. *Payne v. Wallace*, 136 Idaho 303, 306, 32 P.3d 695, 698 (Ct. App. 2001); *Davis v. Gage*, 106 Idaho 735, 741, 682 P.2d 1282, 1288 (Ct. App. 1984). The four elements of this tort are: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress was severe. *Spence v. Howell*, 126 Idaho 763, 774, 890 P.2d 714, 725 (1995); *Payne*, 136 Idaho at 303, 32 P.3d at 698; *Davis*, 106 Idaho at 741, 682 P.2d at 1288. Justification for an award of damages for emotional distress seems to lie not in whether distress was actually suffered by a plaintiff, but rather the quantum of outrageousness of the defendant's conduct. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003); *Brown v. Fritz*, 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985). Although a plaintiff may in fact have suffered extreme emotional distress, no damages are awarded in the absence of extreme and outrageous conduct by a defendant. *Edmondson*, 139 Idaho at 179, 75 P.3d 740; *Brown*, 108 Idaho at 362, 699 P.2d at 1376. Even if a defendant's conduct is unjustifiable, it does not necessarily rise to the level of atrocious and beyond all possible bounds of decency that would cause an average member of the community to believe it was outrageous. *Edmondson*, 139 Idaho at 178, 75 P.3d at 741.

In the present case, the district court dismissed the Cunninghams' intentional infliction of emotional distress claim finding that the respondents' actions, as alleged in the complaint, were not extreme and outrageous. The district court further found that policy considerations dictate that the remedy available to litigants in the form of court sanctions is the appropriate remedy rather than a separate tort action. Moreover, the district court found that the respondents

benefited from an absolute privilege in defamation for statements made during a judicial proceeding and that privilege extends to the claim of intentional infliction of emotional distress.

The Cunninghams assert that the respondents' actions were extreme and outrageous as demonstrated by sanctions imposed by the district court and the attorney fees awarded to the Cunninghams in the previous litigation. Additionally, the Cunninghams argue that the district court's ruling that the proper remedy for the respondents' actions should come from court sanctions rather than a separate tort action is error because court sanctions are not designed, nor appropriate, to fully compensate the victims of intentional infliction of emotional distress.

In determining whether the actions committed by the respondents rose to the level of extreme and outrageous conduct, the district court reviewed cases of similar conduct and concluded that many courts have addressed conduct similar to or more egregious than the allegations in the present case and those courts concluded that the conduct fails to rise to the level of extreme and outrageous. The district court cited two cases involving negotiations in bad faith, allegations of financial ruin to opposing litigants, threats of continued litigation, and the filing of multiple lawsuits which were frivolous and contained false allegations. *See O'Neil v. Vasseur*, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990); *Ulmer v. Frisard*, 694 So. 2d 1046 (La. Ct. App. 1997).

Having reviewed these cases, we agree with the district court's analysis. Because we find no error in the district court's conclusion that the respondents' conduct did not rise to the level of extreme and outrageous conduct for purposes of the intentional infliction of emotional distress tort, we need not address the other grounds for dismissal cited by the district court.

III.
CONCLUSION

The Cunninghams have not shown error in the district court's order dismissing their complaint on an abuse of process claim. Additionally, because the abuse of process claim fails, the claim of conspiracy to commit abuse of process, a derivative tort, must also fail. The Cunninghams have also failed to demonstrate error in the dismissal of their complaint with respect to the claim of intentional infliction of emotional distress. The district court's order granting the respondents' motion to dismiss is affirmed. As the prevailing party, we award costs to the respondents pursuant to I.A.R. 40.

Judge GUTIERREZ and Judge Pro Tem WOOD, **CONCUR.**